

**ALASKA STATE LEGISLATURE
HOUSE TRANSPORTATION STANDING COMMITTEE**

April 15, 2021

2:02 p.m.

MEMBERS PRESENT

Representative Grier Hopkins, Chair
Representative Sara Hannan, Vice Chair
Representative Ivy Spohnholz
Representative Harriet Drummond
Representative Tom McKay
Representative Kevin McCabe
Representative Mike Cronk

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 160

"An Act relating to the state procurement code; establishing the construction manager general contractor procurement method; and providing for an effective date."

- BILLS PREVIOUSLY HEARD/SCHEDULED

PREVIOUS COMMITTEE ACTION

BILL: HB 160

SHORT TITLE: PROCUREMENT; CONSTRUCTION; CONTRACTS

SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/31/21	(H)	READ THE FIRST TIME - REFERRALS
03/31/21	(H)	TRA
04/15/21	(H)	TRA AT 1:00 PM BARNES 124

WITNESS REGISTER

MIKE LESMANN

Legislative Liaison

Office of the Commissioner

Department of Transportation & Public Facilities

Juneau, Alaska

POSITION STATEMENT: Presented HB 160 on behalf of the sponsor,
House Rules by request of the governor.

RICHARD WELSH
Senior Assistant Attorney General
Transportation Section
Civil Division (Juneau)
Department of Law
Juneau, Alaska

POSITION STATEMENT: Responded to questions during the hearing on HB 169.

MIKE LUND, Regional Construction Engineer
Northern Region
Department of Transportation & Public Facilities
Fairbanks, Alaska

POSITION STATEMENT: Responded to questions during the hearing on HB 160.

ACTION NARRATIVE

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CHAIR GRIER HOPKINS called the House Transportation Standing Committee meeting to order at 2:02 p.m. Representatives Drummond, Hannan, and Hopkins were present at the call to order. Representatives McKay, Cronk, McCabe, and Spohnholz arrived as the meeting was in progress.

HB 160-PROCUREMENT; CONSTRUCTION; CONTRACTS

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CHAIR HOPKINS announced that the only order of business would be HOUSE BILL NO. 160, "An Act relating to the state procurement code; establishing the construction manager general contractor procurement method; and providing for an effective date."

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MIKE LESMANN, Legislative Liaison, Office of the Commissioner, Department of Transportation & Public Facilities, presented HB 160 on behalf of the sponsor, House Rules by request of the governor. He stated that the exclusive purpose of HB 160 is to grant the Department of Transportation & Public Facilities (DOT&PF) the authority to write regulations via a pre-existing process between the department and its contractors. He said the proposed legislation would amend AS 36.30, the state's procurement code, to codify the department's current use of the

construction manager/general contractor's (CM/GC's) construction contracting method. The method provides for a two-phase contract, in which the same contractor can provide construction-related services during both the pre-construction and construction phases of a project. He explained that although the procurement method is not a specific option under current procurement law, the department has been using the method successfully under the authority of the innovative procurement language found under AS 36.30.308. This method has been used for public facilities projects, federal aid highway projects, bridge projects, and new vessel construction projects in Alaska for approximately the past 15 years. The method has been utilized even longer in the Lower 48. He said the CM/GC process is recognized in Federal Highway Administration (FHA) regulations, State of Alaska regulations, and other states' transportation regulations; it is an accepted common practice in the construction industry.

MR. LESMANN shared that DOT&PF's experience is that CM/GC contracts can decrease contractor change orders and administrative delays, as well as leverage the department's resources, to the benefit of the state's infrastructure. He said with passage of HB 160, the department would collaborate with the general contractors of Alaska and stakeholders to adopt regulations and "guidance materials" to standardize the method of application in Alaska. He said the department looks forward to providing contractors with "clear and consistent sideboards," which will improve the CM/GC process.

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MR. LESMANN presented the sectional analysis of HB 160, which read as follows [original punctuation provided]:

Section 1. AS 36.30.200(c) is amended to add CMGC (Construction Manager / General Contractor). This section ensures that the Department only uses the contracting method on appropriate projects by requiring that the Commissioner of Transportation and Public Facilities first determine that doing so is advantageous to the State.

Section 2. AS 36.30.250 is amended to add the Department may exclude price criteria when awarding a preconstruction services contract under the CMGC contracting method.

Section 3. AS 36.30 is amended to add a new section AS 36.30.309. This section is the operative provision of the CMGC bill. It identifies the CMGC method as requiring a two-phase contract: one contract for preconstruction services and another for construction services. The Department awards the construction services contract only if the parties can reach an agreed price for construction services for a specific project scope and schedule. If the parties cannot reach an agreed price, the Department may contract with another contractor for construction of the project using any other contracting method under the procurement code.

Section 4. AS 36.30.990 is amended to add the definition for "preconstruction services".

Section 5. Authorizes the Department to adopt regulations that further implement the Act.

Section 6. This section specifies that Section 5 takes effect immediately.

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REPRESENTATIVE HANNAN offered her understanding of several buildings that had been constructed under [regulation] and asked what the impetus was for seeking new statute for something that could be done without it.

MR. LESMANN confirmed that Representative Hannan was correct about the various buildings having been constructed under the CM/GC contracting method. He indicated this has been done via language under Title 36.33.08, which is a section of the procurement law described as "innovative procurements." He said the department wants the statute in order to set up sideboards to the process.

REPRESENTATIVE HANNAN asked for further details regarding innovative procurements and clarity regarding the need to create new statute.

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RICHARD WELSH, Senior Assistant Attorney General, Transportation Section, Civil Division (Juneau), Department of Law, gave an overview of the ad hoc process of innovative procurement, which

undergoes review each time. He said the CM/GC process is seeing increased use nationwide, with federal recognition. He indicated that the proposed statute would create uniformity with regulations and formalize the process. In response to a follow-up question, he said new vessel construction is exempt from the procurement code, but nonetheless, DOT&PF followed the CM/GC process. Regarding whether adoption of statute would enhance the state's ability to direct where the contract is awarded, he specified that local preferences cannot be used when using federal funds, while it is a different matter when using state funds, as when the Ketchikan ship yard was selected to construct a ferry.

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REPRESENTATIVE MCKAY expressed concern regarding his understanding that [DOT&PF] awards a contract to a company for pre-construction services but then, if it likes the work of the company, just awards the construction services contract to the same company without going through the bid process.

MR. WELSH replied that under HB 160, the department would put out a request for proposal (RFP) for any company interested in the CM/GC project; evaluation would take place to award an entity the pre-construction services; at the conclusion of that phase, the contractor and department would work toward a guaranteed maximum price for which the contractor would perform the construction services. He said this is different from the typical invitation to bid, because the contractor that wins the pre-construction bid earns the right to negotiate with the state for the construction services contract. In response to a follow-up question, he emphasized the collaborative process wherein the department has engaged with the contractor during the pre-construction phase, but said there is no guarantee that the contractor who has won the pre-construction phase will get the contract for the construction phase; the contractor must negotiate in good faith, or the state is free to put the bid out to the public.

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REPRESENTATIVE MCCABE asked about the differences between RFP, design build, and CM/GC contracting. Further, he asked about a third-party that ensures the fairness in pricing. Finally, he remarked that the lowest bidder is not always the best choice.

MR. WELSH confirmed there is an independent cost estimator (ICE), who, through separate contract, works with the department and engages with the contractor via an open-book method to ensure the reasonability of costs. He said design build is the manner in which DOT&PF got the fast vehicle ferries, and in this process the owner sets out specification of the build and the contractor does the build for an agreed-upon price. He mentioned invitation to bid (ITB), and he agreed that low bids are not always the best choice due to hidden costs.

REPRESENTATIVE MCCABE talked about the RFP process resulting in low bids and extra costs, and he said with the design build the state gave the contractor the specifications and didn't "really know what they're going to come up with." He surmised that the CM/GC process falls somewhere in between the two.

MR. WELSH responded that he thinks that is a fair statement.

REPRESENTATIVE MCCABE indicated he may be a fan of [the method proposed under HB 160].

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CHAIR HOPKINS noted that the committee had received letters of support from various construction and contractor firms [included in the committee packet]. He asked whether the CM/GC process would be the sole method used if HB 160 were to pass.

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MR. LESMANN responded that this method would remain just one tool in the toolbox; it would not be the only procurement method.

CHAIR HOPKINS asked how the decision process would be made as to which method to utilize.

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MIKE LUND, Regional Construction Engineer, Northern Region, Department of Transportation & Public Facilities, talked about design, bid, build and design build methods and identifying areas where a contractor is needed to help solve a problem. He said the decision is based on many factors, including risk assessment and leveraging department risk.

CHAIR HOPKINS asked Mr. Welsh whether the CM/GC process would be put into regulations or remain a subjective decision.

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MR. WELSH said the intent would be to establish criteria to enable the department to select appropriate projects that are amenable to the CM/GC process, to bring some uniformity to the department's selection process.

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MR. LUND, in response to Representative Spohnholz, gave an example of risk management available via the CM/GC process. He said when the department puts together a project with a design build bid or low bid, it owns the entire contract, the assumptions, and the preparation. He talked about the mitigation of risk up front through communication between the department and the contractor, for example by finding different materials or methods for construction.

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MR. LUND, in response to Representative Hannan, offered examples of when CM/GC has been used successfully. One was a bridge replacement outside Denali National Park. In that construction, use of the CM/GC method enabled the state to "shave eight months" off the schedule and evaluate and execute permitting option it would have never been able to push through between the department and National Park Service without that contractor joining them at the table to discuss possible impacts. He said he has not had a bad experience with CM/GC thus far.

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MR. LUND, in response to a question from Chair Hopkins, confirmed that the CM/GC method was being used on the University Avenue project in Fairbanks. In response to a follow-up question regarding bid size requirements, he said at this point the department has used CM/GC in an ad hoc manner. If able to develop regulations and build onto its knowledge of GM/GC, then a size threshold may not be necessary. He said he would hesitate to name a threshold because that could create unnecessary barriers to opportunities.

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REPRESENTATIVE DRUMMOND directed attention to bill language on page 1, line 14, through page 2, line 2, which read:

(c) Notwithstanding (a) of this section, the Department of Transportation and Public Facilities may exclude price as an evaluation factor when awarding a construction manager general contractor contract under AS 36.30.309.

REPRESENTATIVE DRUMMOND said that concerns her because it sounds like "it's open for consideration once the contract's been signed rather than as an advance consideration."

MR. LUND replied that if the department is able to design the majority of the project, the major issue for which it needs a contractor is "staging and phasing." In this scenario, price may be a relevant factor for actual construction price to be included in the proposal. In other projects where the department may not have the majority of the project figured out, it may not mean much to have a price "before we all know what we want." He said that is one of the reasons there are costs and competitive controls in place that are part of the process "to preserve that competition" and "ensure that the department and contractor are both pricing these projects fairly."

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REPRESENTATIVE SPOHNHOLZ said she shares the concern that if price is stated as not a factor, then the state may be "leveraged along the way." She asked whether the ICE has been a standard practice or is "already described here in the bill clearly."

MR. LUND answered by citing a sentence from page 2 of HB 160, beginning on line 22, which read:

(c) If the contractor providing preconstruction services and the Department of Transportation and Public Facilities do not agree on a price for providing construction services, the department may seek an alternative contractor using a process authorized under this chapter.

MR. LUND noted that the process would include any of the other contracting methods.

REPRESENTATIVE SPOHNHOLZ said she sees reference relating to coming to an agreed upon price but does not see reference to an ICE being involved. She said she thinks there have been a lot of well-documented cases in Alaska where the state has not made the best use of resources, and because the state is in a tight spot financially, she wants the state to be practicing due diligence.

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MR. WELSH said Section 2 would alter statute to allow DOT&PF to eliminate price as an evaluation factor when considering award of a CN/GC contract in order "to avoid the lowball situation." He stated that this would be a precautionary and discretionary - not mandatory - measure. He added that it has nothing to do with the ICE. In response to a follow-up question, he emphasized that an ICE is an integral part of the whole CM/GC process.

REPRESENTATIVE SPOHNHOLZ concurred but said she did not see it spelled out in the proposed statute, and she suggested that may be an omission to be remedied.

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CHAIR HOPKINS asked whether it would be Mr. Welsh's intent that that would be put in regulations which would then be put out for public comment.

MR. WELSH replied that he is confident there is no way that the process would happen without the [independent cost estimator].

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REPRESENTATIVE MCCABE offered his understanding that without an ICE, DOT&PF would have no idea how much a project would cost. He characterized the process as "elegant."

MR. WELSH responded that Representative [McCabe] "has articulated that point." He talked about intervals during pre-construction phases where the parties have formalized meetings where the numbers that are proposed are backed up. As the process progresses, the numbers should solidify. This process prevents any big surprises cropping up during construction phase.

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CHAIR HOPKINS announced that HB 160 was held over.

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ADJOURNMENT

There being no further business before the committee, the House Transportation Standing Committee meeting was adjourned at 2:56 p.m.